Supreme Court, U. S.
FILED
FEB 3 1978
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1096

ROBERT E. FEENEY,
HARVEY L. VELGERSDYK
and JOHN R. PATTERSON,
Petitioners,

vs.

THE SECURITIES AND
EXCHANGE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Michael A. Stapleton
911 Locust Street
Dubuque, Iowa 52001

and

Daniel P. Ernst
911 Locust Street
Dubuque, Iowa 52001

ATTORNEYS FOR PETITIONERS

TABLE OF CONTENTS

Citation to Opinion Below 1
Jurisdiction 2
The Questions Presented 2
Constitutional Provisions, Statutes and Rules Involved . . . 3
Statement of Case 3
Reasons for Granting Writ 6
Conclusion. 9
Appendix A - Decision and Opinion of Eighth Circuit 11
Appendix B - Motion to Remand . . . 17
Appendix C - Order of Eighth Circuit Overruling Motion 23

AUTHORITIES CITED

In Re American Chinchilla Corp., docket #8874 (Federal Trade Commission, 1974) 8
Boruski v. Securities & Exchange Comm., 340 F. 2d 991 (2nd Cir., cert. denied 381 U.S. 943 (1965) . 6
Collins Securities Corp. v. Securities and Exchange Comm., 562 F. 2d 820 (D.C. Cir., 1977) 6,8,9
Ernst & Ernst v. Hochfelder, 425 U.S. 185, 96 S. Ct. 1375, 47 L. Ed 618 (1976) 9
In re Gault, 387 U.S.1, 32 L. Ed 2d 530 6

CONSTITUTION

Fifth Amendment, Due Process Clause 7

STATUTES

3 U.S.C. 555 (b) 7

COMMISSION RULES
Rule 2(b) Rule of Practice of
Securities and Exchange
Commission 8

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. _____

ROBERT E. FEENEY,
HARVEY L. VELGERSDYK,
and JOHN R. PATTERSON,

Petitioners,

vs.

THE SECURITIES AND
EXCHANGE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioners pray for a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on 3 November 1977.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit

dated 3 November 1977 is attached hereto as Appendix A.

JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C., Section 1254(1).

The opinion of the Circuit Court of Appeals was entered on 3 November 1977.

THE QUESTIONS PRESENTED

1. Does an indigent Respondent in administrative proceedings before the Securities and Exchange Commission involving alleged violations of the anti-fraud provisions and registration requirements of the Securities Act of 1933 have a right to appointed counsel at public (or industry) expense for such may result in the imposition of sanctions impairing the right tc one's livelihood?

2. What standard of proof is required of the Commission in administrative proceedings for alleged violation of the anti-fraud and registration requirements of the Securities Act of 1933?

3. Is the Commission required to establish scienter in administrative proceedings for alleged violation of the anti-fraud provisions of the Securites Act of 1933 where such proceedings may lead to the imposition of sanctions seriously interferring with one's livelihood?

4. Is the Commission estopped to prosecute for alleged violation of the registration requirements of the Securities Act of 1933 after an agent of the Commission represented the security to be exempt from those requirements and that representation was relied upon?

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

Due process clause of the Fifth Amendment.

STATEMENT OF CASE

The Securities and Exchange Commission found the Petitioners had violated the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C., Section 77q (a) and aided and abetted in the violation of the registration provisions of that 1933 Act, 15 U.S.C., Section 77e (a) and 77e (c), and barred them from the business for one year with the right to reapply under specified conditions.

The transaction giving rise to the administrative proceedings involved the sale of land contract assignments and mortgages and notes of New Life Trust, an Arizona land development corporation, which distributed them through its underwriter, Vande Vegte, Inc., a Minnesota corporation, who in turn supplied them to various broker-dealers, including

Kirsch, Chandler, Feeney & Company,Inc., located in Iowa. The Petitioners were stockholders and officers of Kirsch, Chandler, and were in charge of sales at their respective local office.

Kirsch, Chandler was run by its president, Arthur Kirsch and vice-president, R. Chandler, who had full responsibility for procuring the investments to be sold by the company, and who were charged with making the investigations, including the financial condition and all other relevant matters leading to the decision to take on the particular product. Further, Kirsch and Chandler had to determine the legal status of the proposed security, including compliance with the registration requirements, both Federal and State, and they did so here.

The administrative proceedings were conducted in two phases, one held in June of 1974 in Arizona for the purpose of determining the nature of the New Life Trust operations. Petitioners were not represented there and did not attend in person.

The second phase was conducted at various locations of the broker-dealers, and that for Kirsch, Chandler was held in Des Moines in October of 1974. The company, as well as all individuals associated with it, except for the Petitioners, entered into consent orders, and the matter proceeded as to the Petitioners only.

They were not represented by counsel in that hearing nor in any of the review proceedings before the Commission. The petition for the appointment of counsel on the basis that they were indigent and incompetent to represent themselves complicated proceedings. This was denied by the Administrative Law Judge for the reason that the Commission had no policy permitting such appointment, and the matter proceeded to hearing.

An examination of the Des Moines transcript shows their defense was reliance upon Kirsch's investigation and the disclosure made to them by him, including their belief that the securities were exempt from registration based upon the representation made to Kirsch by an official of the Commission.

Kirsch was the key to their defense, and he was not called to testify at the hearing by the Petitioners, the Division of Enforcement or the Administrative Law Judge. In November 1977 after the decision rendered by the Circuit Court of Appeals, Kirsch in other proceedings identified that official, who admitted such representation to have been made to Kirsch. This prompted the Motion to Remand (Appendix B). The record in these administrative proceedings consisted of over 2,800 pages of testimony and over 500 documents, including exhibits.

REASONS FOR GRANTING WRIT

This petition presents substantial questions on the right of indigents to appointed counsel in administrative proceedings before the Securities and Exchange Commission, and also raises important questions relative to the burden of proof imposed upon the Commission in such proceedings.

1. Boruski v. Securities and Exchange Comm., 34F. 2d 991 (2nd Cir. 1965), cert. denied 381 U.S. 943 (1965) cited in the opinion of the Circuit Court of Appeals holds that there is no right accorded an indigent person in administrative proceedings to appointed counsel. The reason is that the proceedings are not criminal.

However, as cogently observed in Collins Securities Corp. v. Securities and Exchange Commission, 562F 2d 820 (D.C. Cir. 1977) the sanctions are penal in nature and not solely remedial.

The effect of the sanctions are so wide ranging that the person affected is left without a means of livelihood. This is most serious and surely of greater consequence than the threat of a possible short jail sentence that may be imposed in misdemeanors, and of more far reaching consequence when compared to the right of an indigent parent to have counsel provided in juvenile proceedings where the parent has no criminal exposure. In re Gault, 387 U.S. 1, 32 L. ed 530 (1967).

Since Boruski was decided in 1965 the law on the right of an indigent to appointed counsel has undergone far ranging changes which require that decision to be re-evaluated in light of the reality facing a party to an administrative proceeding before the Securities and Exchange Commission.

2. 5 U.S.C., Section 555 (b) of the Administrative Procedural Act provides that everyone obligated to appear before an administrative agency is entitled to be represented by counsel, but this has been interpreted to mean that counsel does not have to be furnished at public expense. Likewise, Rule 2b of the Rules of Practice of the Securities and Exchange Commission provide that an attorney may represent that person appearing before it, but this has been interpreted not to require that counsel be furnished at its expense to indigent Respondents.

The rules recognize a layman is not able to defend himself in such highly specialized, complex proceedings, and really make meaningful the due process requirements of the Fifth Amendment. But realization of such a right depends upon whether the person affected is able to afford the substantial attorney fees charged by this branch of legal specialty along with what can be monumental costs incidental to such defense. But the test to determine if due process is actually being met should not depend upon whether a

person can afford counsel, for if, because of financial circumstances, counsel cannot be obtained, due process then becomes a meaningless metaphor.

The Federal Trade Commission has adopted a rule which provides that indigent Respondents shall be provided counsel at the agency's expense. In Re American Chinchilla Corporation, Docket #8774 (1974).

The rules of the Securities and Exchange Commission should require that indigent Respondents be furnished counsel at the expense of the agency or as an alternative thereto by the adoption of a rule requiring the industry to fund such costs.

3. By providing counsel for indigents in these administrative proceedings would tend to equalize, at least to some degree, the relative position of the party and the Division of Enforcement of the Commission with its vast array of expertise in that field.

4. The Circuit Court of Appeals did not evaluate this matter in light of the standard of proof announced in Collins Securities Corporation v. Securities and Exchange Commission, 562F. 2d 820 (D.C. Cir. 1977).

5. The Commission should have the burden to establish scienter on the part of persons alleged to have

violated the anti-fraud provisions of the Securities Act of 1933. Ernst & Ernst v. Hochfelder, 462 U.S. 185, 96 S. Ct. 1375, 47L. ed 2d 668 (1976), Collins Securities Corporation v. Securities and Exchange Commission, 562F. 2d 820 (D.C. Cir. 1977).

The review accorded by the Circuit Court of Appeals in this matter did not emcompass this element of proof.

6. Bearing in mind the limitations of the Doctrine of Estoppel and recognizing an increasing liberality of its application to the Court of Appeals should have remanded the matter to the Commission for further proceedings.

Surely if the doctrine is not a bar to the enforcement of the law against the Petitioners, yet the facts surrounding such should be considered in mitigation of the sanctions to be imposed.

CONCLUSION

For the reasons stated it is respectfully requested that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

Michael A. Stapleton
911 Locust Street
Dubuque, Iowa 52001
Telephone: (319) 583-7396

and

Daniel P. Ernst
911 Locust Street
Dubuque, Iowa 52001
Telephone: (319) 583-7396

Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 76-2026

Robert E. Feeney,
Harvey L. Velgersdyk
and John R. Patterson,

Petitioners,

v.

Securities and Exchange
Commission,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF
THE SECURITIES AND EXCHANGE COMMISSION

Submitted: August 30, 1977

Filed: November 3, 1977

Before GIBSON, Chief Judge, LAY and
HEANEY, Circuit Judges.

GIBSON, Chief Judge.

The petitioners, Robert E. Feeney, Harvey L. Velgersdyk and John R. Patterson, were formerly branch managers of Kirsch, Chandler, Feeney and Co., Inc., a registered securities dealer operating in the state of Iowa. In their capacities as branch managers and securities salesmen they sold unregistered securities composed of notes and mortgages purportedly secured by Arizona real estate. The notes and mortgages, issued by New Life Trust, Inc., were worthless.

The Securities and Exchange Commission found that petitioners willfully violated the anti-fraud provisions of sec. 17(a) of the Securities Act of 1933, 15 U.S.C. sec 77q(a), and willfully aided and abetted violations of the registration provisions of secs. 5(a) and 5(c) of the Securities Act, 15 U.S.C. secs. 77e(a) and 77e(c). As sanctions, the Commission barred petitioners from association with any broker or dealer, with the proviso that the petitioners could, after one year, reapply to become associated in a non-supervisory, non-proprietary capacity, subject to adequate supervision. A careful review of the record discloses substantial evidence to support these findings and, perceiving no error of law, we affirm.

Feeney, Velgersdyk and Patterson were stockholders, directors and vice presidents of Kirsch-Chandler. Each was a registered representative and registered principal licensed by the National Association of Securities Dealers. From autumn 1971 to autumn 1973 petitioners sold to the public assignments of contract rights, and 12% notes and mortgages issued by New Life Trust, Inc., an Arizona corporation purporting to develop a residential community in the desert. New Life Trust paid 20% commissions for these sales. Feeney, Velgersdyk and Patterson received 10% on the securities that they personally sold and 5% on those sold by employees under their supervision.

The record is clear that New Life Trust was in poor financial condition throughout its brief existence and was adjudged bankrupt on November 27, 1973. The "first mortgages" that purported to secure the investors were worthless because no serious effort was made to develop the land. In any event, the land could not be encumbered without permission of a trustee who held title under an installment purchase contract entered into by New Life Trust. No permission was sought or received.

In selling these securities, petitioners made numerous false representations to members of the public as to the soundness and nature of the investments. Often the buyers were elderly, poorly educated and totally unprepared

for these high risks. Given the red flags of 12% interest, 20% sales commissions and the fact that a desert development was involved, it is clear that there was substantial evidence to support the Commission's finding of violations of the anti-fraud provisions of sec. 17 (a) of the Securities Act of 1933, 15 U.S.C. sec. 77q(a).

The petitioners, as professional securities salesmen, have a direct obligation to the public to investigate the relative value of securities offered by them and to apprise the public of material facts respecting the value of such securities. See Hanly v. SEC, 415 F.2d 589, 597 (2d Cir. 1969). Quite to the contrary, the petitioners falsely represented that the securities were secured by first mortgages, that the lots were three times the value of the notes, and that a shopping center was on the site and houses were being built, when they had no adequate reason to believe such representations to be true. Investigation of the actual facts would have revealed raw desert land without potable water, many miles removed from the ordinary amenities of life.

Particularly revealing of the petitioners' total disregard of their obligation as professional securities salesmen to the public was the contention before the Commission that, "so long as no governmental action was taken to prevent NLT (New Life Trust) from selling lots, they were entitled

to assume that NLT's three-year notes were a good investment." It is obvious that persons entertaining such views of their responsibilities to the public should not be engaged in the securities business, a business uniquely suited for unloading worthless securities at high sales expense to unsuspecting members of the public. Here, persons least able to risk their modest savings were encouraged to invest in schemes apparently operated solely for the benefit of the promoters and securities salesmen.

Feeney, Velgersdyk and Patterson do not challenge the finding that they sold securities that were required to be registered. Rather, they claim that they were entitled to rely on the assurances of the other company officers that registration was not required. We reject that contention. This court has recently recognized that ignoring the obvious need for further inquiry and reckless indifference to suspicious facts will support a finding of a violation of secs. 5(a) and 5(c) of the Securities Act, 15 U.S.C. secs. 77e (a) and 77e (c). Wasson v. SEC, 558 F. 2d 879, 887 (8th Cir. 1977). Certainly officers of a broker-dealer firm managing branch offices must be expected to have sufficient knowledge of the securities laws to investigate affirmatively the registration requirements of such securities.

Finally, petitioners urge that the Commission erred in not providing

appointed counsel for them. Although serious sanctions affecting the petitioners' ability to earn a livelihood are authorized, this is not a criminal proceeding. Assuming that petitioners are indigent, the simple fact is that the Constitution, the statutes and prior case law do not require the appointment of counsel at public expense in this type of administrative proceeding. Boruski v. SEC, 340 F.2d 991, 992 (2d Cir.), cert. denied, 381 U.S. 943, 944 (1965).

The order appealed from is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ROBERT E. FEENEY, HARVEY L. VELGERSDYK, and JOHN R. PATTERSON, Petitioners,	)	
vs.	)	NO. 76-2026
SECURITIES and EXCHANGE COMMISSION, Respondent.	)	

. . . . . .

APPLICATION FOR REMAND TO SECURITIES AND EXCHANGE COMMISSION

The Petitioners present to the Court as follows:

1. They appeared pro se in the administrative proceedings held in Des Moines, Iowa; they were not represented in those proceedings in Phoenix, Arizona except as they may have benefited by the corporation having been represented at those hearings along with its president, Arthur Kirsch by Mr. Kirsch's attorney; they represened themselves in the review proceedings before the Commission.

2. Kirsch, Chandler, Feeney and Company, inc., an Iowa corporation, was the broker-dealer which Petitioners were affiliated with during the events which gave rise to these proceedings.

3. Arthur J. Kirsch was president of KIRSCH, CHANDLER and the officer charged with responsibility for conducting the investigation of the operations, condition and facilities of firms whose securities were to be marketed through KIRSCH, CHANDLER, including New Life Trust and its development, El Camino de Sol.

4. Arthur J. Kirsch as president also had the responsibility to investigate the various securities to be offered for sale through KIRSCH, CHANDLER to determine if such were in compliance with the Federal and State securities laws, including the notes, mortgages and contract assignments of New Life Trust.

5. Roderick Chandler, executive vice-president of KIRSCH, CHANDLER, assisted in making the investigations.

6. One of the major points in the defense urged by the Petitioners gleaned from an examination of the transcript was that they relied upon Messrs. Kirsch and Chandler in making these investigations, and that under the company structure and policy they had no right to make separate investigations, and that it was the functions of Messrs. Kirsch and Chandler to seek out and

provide the products to be sold by KIRSCH, CHANDLER, and the Petitioners' job was to sell those products.

7. The details of what Mr.Kirsch and Mr. Chandler did in connection with those investigations, what such revealed, and the specifics learned about the matters inquired into does not appear of record.

8. The Petitioners, appearing pro se, did not call Arthur Kirsch or Roderick Chandler as witnesses, nor did any of the four attorneys representing the Division of Enforcement of the Securities and Exchange Commission call Mr. Kirsch or Mr. Chandler, nor were they called as witnesses by the Administrative Law Judge presiding at that hearing.

9. Arthur Kirsch resided in Des Moines at the time of the administrative hearing in October of 1974 involving these Petitioners and continues to reside there now.

10. Petitioners did not call Arthur Kirsch or Roderick Chandler because they did not understand fully the proceedings against them, and did not comprehend the importance of the details which Arthur Kirsch and Roderick Chandler could have supplied as bearing upon their legal position, and were worried about the talk of possible criminal prosecutions, and believed Mr. Kirsch's and Mr. Chandler's interests

were adverse to theirs and that they were hostile toward them, and did not know how to approach the problem because of these factors.

11. Petitioners believe that Arthur Kirsch and Roderick Chandler are possessed of knowledge of facts directly bearing upon their liability including the details of their investigation of the financial condition of New Life Trust, the state of the development of El Camino de Sol at the time of their investigation and the safety and security of New Life Trust investment, and bearing upon the question of the exemption of those securities from registration requirements of the Securities Act.

In that connection Arthur Kirsch identified the officials of the Securities and Exchange Commission who advised him that the mortgages and notes and contract assignments of New Life Trust were exempt from registration, and that official admitted making such representation to him at the time of the trial of the federal criminal case brought in Arizona against officials of New Life Trust and others, including Arthur Kirsch (who was acquitted). Further, there was introduced into the trial certain written communications from an official of the Securities & Exchange Commission advising that mortgages were exempt from registration.

12. Such evidence bears directly upon the liability of the Petitioners for violation of the anti-fraud provisions under Sec. 17a of the Securities Act of 1933, as well as upon their alleged violation of the registration requirements of Sec. 5 (a) and Sec. 5 (c) of the Securities Act.

13. Such information came to the attention of the Petitioners only recently during the deposition of Arthur Kirsch taken in connection with certain civil litigation arising out of the sales of New Life Trust mortgages and notes and contract assignments.

WHEREFORE, Petitioners move the Court to remand this case to the Securities & Exchange Commission for the purpose of receiving additional evidence which bears upon the issues presented in those proceedings.

ROBERT E. FEENEY, HARVEY L. VELGERSDYK and JOHN R. PATTERSON,
Petitioners,

By: _____
Michael A. Stapleton
911 Locust Street
Dubuque, Iowa 52001
Telephone: 319/583-7396

ATTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the attached Application for Remand to Securities and Exchange Commission was served upon:

David Ferber

Solicitor to the Commission of the Securities and Exchange Commission by enclosing the same in an envelope addressed to him at his office at:

Securities and Exchange Commission
Office of the General Counsel
500 North Capitol Street, Room 713
Washington, D.C. 20549

with postage fully paid and by depositing the said envelope in a United States Post Office mailbox in Dubuque, Iowa on 9 December 1977.

Michael A. Stapleton

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

September Term, 1977

No. 76-2026

Robert E. Feeney, et al,
Petitioners,
vs.
Securities and Exchange Commission,
Respondent.

PETITION FOR REVIEW OF ORDER OF THE SEC

Application of petitioners for remand of the above case to the Securities and Exchange Commission having been considered by the Court, it is now here ordered that the application be, and it is hereby, denied.

December 27, 1977